

MONTANA PUBLIC DEFENDER COMMISSION

Minutes

Office of the State Public Defender, Central Office
44 W. Park
Butte, Montana

September 7, 2007

(Approved at the October 11, 2007 Commission Meeting)

Call to Order

The Montana Public Defender Commission meeting was called to order by Chairman Jim Taylor at 8:35 a.m.

Commissioners Present

Betty Bichsel, Edgar; Dan Donovan, Great Falls; Vic Miller, Harlem; Stephen Nardi, Kalispell; Mike Sherwood, Missoula; Jennifer Hensley, Butte; Caroline Fleming, Miles City; Tara Veazey, Helena; and James Park Taylor, Missoula.

Commissioners Absent

Wendy Holton, Helena; and Ivan Small, Poplar

Interested Persons

Brent Doig, Office of Budget and Program Planning; Cathy Day, American Civil Liberties Union of Montana

Approval of Minutes from the July 27, 2007 Meeting

Commissioner Miller moved to adopt the minutes as submitted. Commissioner Nardi seconded the motion. The motion carried.

Contract Attorney Fees/Caps

There was a broad discussion of contract attorney costs and possible containment mechanisms, including establishing soft caps for certain kinds of cases. An advantage of soft caps is that it would reduce the “nickel and dime” scrutiny that many contractors find offensive. However, unlike the federal defender system where billing is done only at the end of a case, OPD requires monthly billing and there is currently no method for tracking “to date” costs. Utilizing the state’s purchase order system for this purpose is estimated to cost \$20,000 plus additional staff. An alternative might be to establish a soft cap honor system, with periodic audits. Another drawback to soft caps is that the cap becomes a set fee—contractors are unlikely to come in at a cost under the established cap.

Chief Public Defender Randi Hood said that the length of time a case takes varies not only from region to region, but also from court to court within a region. She and Contract Manager Larry Murphy will review the Region 9 (Billings) August data to see how long cases are taking. Chief Hood noted that the independent contractor status limits the amount of control OPD has regarding how contract attorneys do their work or how long it takes. Mr. Murphy continues to recruit contract attorneys so that OPD has more control over contractor assignments, rather than being forced to work with a limited number of contractors in a particular area.

Commissioner Sherwood (Contract Committee Chair), Mr. Murphy, and Financial Manager Sandra Law will meet to look at the contract attorney and FTE data. Administrative Director Harry Freebourn asked Commissioner Sherwood and Mr. Murphy to develop a list of questions that they want the data to answer.

Chairman Taylor emphasized the need to keep discussion of contractor cost containment on the table so that the Commission can confidently state that all avenues have been explored to control costs during the next legislative session.

Appellate Defender Program Report

Chief Appellate Defender Jim Wheelis reported on the number of current appellate cases, broken down by FTE and contract attorneys, as requested at the last meeting (exhibit 1). He introduced Office Manager Sarah Braden, responsible for managing contacts with 180 court reporters. The new appellate rules, effective October 1, will increase pressure on the office. The new rules require that transcripts be requested the same day the appeal is filed.

The Commission noted that the Appellate Office is handling more cases each month. Chief Wheelis said that the office is shaking out and they are able to handle more cases because they are working more quickly. He thinks that a reasonable caseload for FTE is roughly 20-24 cases annually, slightly under the 25 cases established in the Standards. He is gradually learning which contractors to work with, and hopes to add one more in-house attorney in the next budget cycle. A “tsunami effect” is expected in October due to the number of cases that were delayed at the end of the last fiscal year to control FY 07 costs.

Chief Wheelis reported that there is a technical stall on getting the brief bank on the web.

Westlaw and LEXIS Presentations

Representatives from Lexis and Westlaw were invited to make presentations to the Commission to explore the possibility of adding research access as a benefit to contract attorneys (exhibits 2 and 3). Following the presentations, Mr. Freebourn noted two points related to Lexis. The state already has a contract with Lexis, enabling them to offer an extremely low price. In addition, purchasing additional licenses under the existing state contract would not require an RFP process; should the Commission choose Westlaw, Title 18 (state purchasing law) would have to be followed.

Since regular Lexis subscribers might pay \$500-2,000 per month, offering a subscription to contractors at the state rate (\$20 per month per user) could be a good recruiting tool. Chairman Taylor suggested that the benefit could also be used as part of a pro bono program, with a certain number of pro bono cases per year entitling an attorney to free Lexis access. He will research the cost of providing malpractice insurance, which is required for pro bono work. He encouraged the Commission to think about a pro bono program.

Public Comment—Contract Attorneys

No public comment was offered at this time.

Public Comment—General

No comment was offered from the public at this time. However, Commission members made several comments.

- Commissioner Sherwood asked if Todd Glazier's issue (emailed to the Commission) had been resolved; it has.
- Chairman Taylor received a call from Montana People's Action to say that they thought things were going well, and they would let him know if issues arise.
- Several Commissioners have received calls concerning the Billings office, and Chief Hood was asked to address the issues in her report.
- Commissioner Veazey asked how to field client complaints, and was directed to the client grievance procedure on the website. Staff were asked to begin tracking complaints by region. Commissioners can also direct complaints to Mr. Freebourn or Chief Hood for investigation.

Reports

Chief Public Defender Report

- *Public Defender Program Update*

Chief Hood addressed the issues in Billings. Historically, caseloads in Yellowstone County were quite low; they didn't do dependent/neglect or mental health cases. (Contract attorneys are still handling mental health commitments.) Some of the "old guard" attorneys are complaining that since OPD took over their caseloads are too high, when in fact they are at the low end compared to Missoula and Kalispell. These attorneys also want to accept only certain types of cases. At one time there were three attorney vacancies, but they are now down to one and working hard to fill it (exhibit 4). Chief Hood is confident that the managing attorney and regional deputy are monitoring and distributing the workload appropriately. The Commission can expect to hear more complaints about caseloads from Billings, but this issue also came up in a labor/management meeting, and the union is supportive of OPD's handling of the situation. Performance appraisals are in progress in Billings both for FTE and contract attorneys, and are expected to be complete by late September.

In Missoula, Managing Attorney Brian Smith and Chief Hood have implemented a student worker plan. This position is for an entire school year and includes a public relations component—the student worker is expected to convey their enthusiasm for public defender work to their fellow students. This program is in addition to the summer internship program, which Chief Hood hopes to expand from Missoula and Helena to Billings and Kalispell this year.

The eleven regional deputy public defenders will receive the Governor's Award for Excellence in Performance on September 18. Chief Hood is very proud of them. She met with them last month to identify concerns large and small. It was a good meeting and she hopes to meet with them quarterly.

Chief Hood, Mr. Murphy and Mr. Freebourn plan to travel the state over the next few weeks to connect with contractors from various regions, listen to their concerns and provide the opportunity for open discussion. They will also discuss the budget situation and discuss the policy regarding private caseloads. The first stop is Kalispell next week.

The budgeting process is complete. The regional deputies put together their individual budgets, which came to \$21.9 million. Chief Hood and Mr. Freebourn adjusted the individual budgets to accommodate OPD's \$19.7 million appropriation, and then met with each regional deputy to explain the final budget. It was a good process.

Performance appraisals for both FTE and contract attorneys will be conducted simultaneously over the next three to four months. The hope is to finish by the end of December.

- *Current Caseloads*

Chief Hood attended the meeting of the American Council of Chief Defenders (ACCD) in San Francisco last month. The ACCD, consisting of chiefs of local, state and appellate systems, adopted a statement on caseloads and workloads (exhibit 5). The statement recognizes that a single number can't be identified for caseloads—cases need to be weighted by factoring in the court, the prosecution, the individual attorney's level of experience and more. The new JustWare, to be implemented in October, will provide a much better sense of what OPD attorneys are doing in relation to the caseload standard.

- *Union Issues*

A new attorney contract is being negotiated. Chief Hood expects a good and fairly speedy process. By statute, the contract must be ratified by the end of September so that the attorneys can get the 3% raise authorized by the Legislature, effective October 1.

- *2007 and 2009 Biennium Financial Update*

Mr. Freebourn informed the Commission that 17 contractors were not paid in full for FY 07 bills. He described in detail the process used to make payments with the available FY 07 funds. Mr. Freebourn worked closely with budget analyst Brent Doig throughout the process. Ultimately, contractors that billed for services prior to January 1, 2007 were denied payment for that portion of their claim. The total was approximately \$60,000 and three contractors accounted for 70% of that amount. Most of the contractors were gracious and understanding regarding the situation and will continue to work with OPD. Two contractors were extremely unhappy, however, and threatened to sue. Mr. Doig will consult with the Department of Administration legal counsel at the Commission's urging.

Mr. Freebourn reviewed the FY 06 and FY 07 Un-audited Expenditures vs. Original Appropriation and Strategic Plan (exhibit 6) and the Financial Statement through August 31, 2007 (exhibit 7). Commissioner Veazey was concerned about the disproportionate expenditures compared to the percentage of poverty population for Region 2. They have both high salary and high contractor costs. Part of this is due to the lack of vacancy savings in Missoula—jobs fill immediately there. Staff will investigate other possible reasons and report to the Commission.

The Commission Budget for FY 08 (exhibit 8) was presented. Video conferencing equipment will be installed in the Central Office conference room. It will be available for Commission use as well as for training purposes.

The FY 2008 Budget (exhibit 9) includes a \$400,000 contract management contingency fund to cover large cases or "caseload explosions." A process will be implemented for

regional offices to request these funds. The personal services budget doesn't include overtime, temporary employees or merit raises. These will be funded through vacancy savings. Monthly reports will be generated to assist Mr. Freebourn, Chief Hood and the regional offices in monitoring the budget throughout the year.

The draft Fiscal Year 2007 Report to the Governor, Supreme Court and Legislature (exhibit 10) includes preliminary case counts. Case data is still being cleaned up in some regions, and final case counts will be available in October.

- *CIMP Update*
Information Technology Manager Teri Heiland discussed the Case Information Management Project (CIMP). Training and conversion by region are planned to occur throughout the month of October, finishing with Regions 9-11 the first week of November (exhibit 11). OPD staff are in the process of closing cases and cleaning data in preparation for the launch. The new system will allow for "lockdown" of certain kinds of data so that attorneys can't see each others notes unless they have been delegated that authority. The Commission requested that the statute field be required for all cases, including contract attorneys, and that a field indicating whether a case goes to trial be included. This information will be useful in the discussion of caps. They also requested that client race be tracked. "Refuse to disclose" can be an option on the intake form, but it is important to get as much information as possible regarding the client base.
- *Training Coordinator Update (exhibit 12)*
Chief Hood reported that the feedback on the DUI training was terrific. The annual conference in October will focus on forensics. She is very excited about the cultural sensitivity training to be conducted in three locations in December. There will be a two-track boot camp this year, one for brand new attorneys and one for those with some experience. All training sessions (with the exception of investigator training and boot camp, which are by invitation only) are open to all FTE and contract attorneys. Commission members are always welcome as well.
- *Contract Officer Update*
Mr. Murphy reported that the new Memorandum of Understanding (MOU) for contract attorneys has been distributed. It states that claims submitted more than 45 days from the last day of the month of service will be denied. The mental health MOUs have also been circulated, and Training Coordinator Eric Olson is working on an investigator MOU.

It has been difficult to recruit contract attorneys in eastern Montana. Some of them have refused to sign our MOU, which puts the regional deputies in a bind. The contractors are making plenty of money and don't need public defender work to supplement their practices. Commissioners Veazey and Taylor firmly stated that OPD cannot do business with contractors who refuse to follow the Standards or sign the MOU. Additional FTE may be needed.

Mr. Murphy asked the commission to adopt a rate schedule for investigators (exhibit 13). The rate presented is the same rate previously paid by the Office of the Supreme Court Administrator, and currently paid by OPD. Commissioner Miller moved to adopt the rate as presented. Commissioner Fleming seconded. The motion carried.

Policies and Procedures

Policies presented for the Commission's information were Determining Conflicts of Interest, Closing Cases, Workplace Safety, and Release of Information (exhibits 14-17). The policy regarding assessing contract attorneys' workloads will be drafted following the meetings with contractors around the state. A policy will also be drafted to address FTE who think their caseload is too high.

Public Comment

No comment was offered from the public at this time. Commissioner Sherwood reported that he received a call from Bob Shea, a clinical psychologist from Missoula. Dr. Shea is unhappy with the interim mental health rates, and is frustrated with delays caused by the attorney having to obtain medical records. He has not discussed his concerns with OPD Mental Health Consultant Dr. Laura Wendlandt. Commissioner Fleming asked why these kinds of questions were coming to Commissioners rather than going through the appropriate channels (Dr. Wendlandt in this case). Chief Hood will pass Dr. Shea's concerns on to Dr. Wendlandt.

Old Business/New Business (*Action Items)

Commissioner Hensley suggested moving to quarterly Commission meetings, perhaps meeting for a day and a half. Commissioner Veazey agreed, stating that it's time for the Commission to step back and do more macro-managing and less micro-managing. Chairman Taylor doesn't think the Commission can provide adequate oversight with only four meetings per year, but would consider six meetings. He likes the idea of having committee meetings the afternoon before the full meeting. Chief Hood appreciates the tremendous amount of work that Commission members have put in and the guidance they've provided to her and all of her staff. Meeting frequency will be discussed again at the October meeting.

Commissioner Veazey asked about public defender representation in civil order of protection cases. Each individual attorney is responsible for deciding if it will affect a client's criminal case—otherwise, it is outside of OPD's responsibility. She is concerned that public funds are being used for non-constitutionally mandated services. Chief Hood will do a survey to see what the practice is around the state.

Future Meetings

The next meeting will be October 11, to be held in conjunction with OPD's annual training conference in Livingston.

Adjourn

The meeting adjourned at 3:40 p.m.

Exhibits 1 – 17 have been posted with these minutes to the Office of the State Public Defender website at: <http://www.publicdefender.mt.gov/>. Exhibits 18-19, which were distributed at the meeting but not discussed, are also available on the website.